

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

837

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,907
(Crim. No. 873-67)

UNITED STATES OF AMERICA,
Appellee,

v.

ROBERT L. STUCKEY,
Appellant.

BRIEF FOR APPELLANT

APPEAL FROM A JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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(By Appointment of This Court)

18 August 1970

United States Court of Appeals
for the District of Columbia Circuit

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Appellant.

BRIEF FOR APPELLANT

APPEAL FROM A JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

JURISDICTIONAL STATEMENT

This is an appeal from a judgment entered by the United States District Court for the District of Columbia upon appellant's conviction, after trial by jury, of a violation of 26 U.S.C. §4704(a); 26 U.S.C. §4705 and 21 U.S.C. §174.

The United States District Court for the District of Columbia had jurisdiction of the matter by virtue of 11 D.C. Code §521. The jurisdiction of this Court is invoked under the Act of June 25, 1948, c 646, 62 Stat. 929 (as amended) 28 U.S.C. §1291.

STATEMENT OF THE CASE

The Appellant, herein, ROBERT L. STUCKEY, was arrested on the morning of 20 April 1967 (Tr. 64; Tr. 104), upon a warrant sworn out by an undercover narcotics agent alleging the illegal sale of narcotics. (Tr. 56). The alleged sale was said to have occurred on the 10th of March 1967. (Tr. 7).

The appellant was subsequently charged in a three count indictment on the 17th of July 1967, with violation of Federal Narcotics Statutes to wit; 21 U.S.C. §174 (possession of heroin); 26 U.S.C. §4704(a) (sale of heroin not in the original stamped package or from the original stamped package) and 26 U.S.C. §4705(a) (the sale or exchange of heroin not in pursuance of a written order form as approved by the Secretary or his delegate).

After a delay of two years and nearly four months, Mr. Stuckey was brought to trial and found guilty on all three counts.

The government's case consisted principally of placing three undercover narcotics agents on the stand in order to testify to the transaction in question. The government also called a forensic chemist who testified to the constituent nature of the substances purchased by agent Collins.

No testimony or other evidence was introduced by the government in an effort to establish the origin of the heroin in question.

The case of the appellant consisted entirely of the defense of alibi. In addition to one alibi witness (Mr. Cunningham), the defense entered into evidence copies of the, "Metropolitan Police Department Report Form No. PD 251" and the "Patient History and Summary Sheet" of Freedman's Hospital (No. 261172) as Defendant's Exhibits 3 and 4 respectively. These exhibits were stipulated to by the government and otherwise unchallenged. These reports conclusively established the presence of the appellant at a location different from that at which the alleged transaction in illegal narcotics took place. Mr. Stuckey also took the stand on his own behalf.

Upon the conclusion of arguments the Court instructed the jury in regard to the elements essential to prove a violation of the statutes involved. However, the Court also instructed the jury that possession of an unstamped narcotics package allowed the jury to rely upon the statutory inference that the narcotic drug was purchased, sold, dispensed, or distributed otherwise than in the original stamped package or from the original stamped package. Furthermore, the Court instructed the jury in accordance with 21 U.S.C. §174 that possession of a narcotic drug is deemed to be sufficient evidence to authorize conviction; i.e., that the defendant knew that the narcotic drug was illegally imported into the

United States, unless defendant should explain that possession to the satisfaction of the jury.

The appellant was found guilty on all three counts.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1.

This Court is respectfully requested to investigate the validity of the conviction of Robert L. Stuckey in view of the fact that certain documentary evidence establishing a conclusive alibi was unchallenged by the government. That is, that the verdict of guilty is against the weight of the evidence presented.

(The Court is respectfully requested to read Tr. 47 through 237 in connection with this point.)

2.

This Court is respectfully requested to investigate the constitutionality of the statutory presumption of guilt contained in 21 U.S.C. §174. In addition, and in conjunction with this question the Court is requested to make the same investigation in regard to the statutory inference of guilt contained in 26 U.S.C. §4704(a); and whether or not the lower Court's instruction to the jury in accordance with the statutory inferences and presumptions amounted to constitutionally prohibited comment upon the accused's right to remain silent.

(The Court is respectfully requested to read Tr. 47 through 237 in conjunction with these points.)

3.

This Court is further requested to determine whether, under recent decisions of the Supreme Court, the regulatory scheme contained in 26 U.S.C. §4701

et seq. violates the right of an individual to remain free of self-incrimination under the Fifth Amendment of the Constitution of the United States.

(The Court is respectfully requested to read Tr. 47 through 237 in regard to this point.)

This Court is also requested to consider whether or not the delay of one month between the alleged crimes and arrest of Mr. Stuckey, followed by a further delay of over two years to the time of trial unduly prejudiced the Appellant and amounted to violation of the Appellant's Sixth Amendment right to a speedy trial.

(The Court is respectfully requested to read the Tr. 3 through 33 in regard to this point.)

Statement Required Under Local Rule 8(d)

This case has not previously been before this Court, under either this title or a similar title.

E(c)

1. Denial - Motion for Dismissal - based of Speedy Trial (Tr. 3-33).

Appellant Was Convicted Against the Weight of
The Evidence When the Jury Choose to Ignore the
Unchallenged Documentary Evidence Establishing
Alibi.

The principal part of the government's case consisted of establishing the time and place of an alleged illegal transaction in narcotics. In order to establish this transaction, and to link the Appellant with the transaction, the government placed three undercover agents on the stand. Each testified to substantially the same set of facts. That is, in the afternoon of the 10th of March 1967 in the approximate vicinity of Morton and Georgia Avenues, N.W., in the District of Columbia an illegal transaction in narcotics took place (Tr. 50-51; Tr. 99-100; Tr. 129); that, at that time, Mr. Collins was employed as an agent with the Federal Bureau of Narcotics and Dangerous Drugs and at the particular time in question was acting as an undercover agent (Tr. 50-51). Each of the witnesses further testified that between approximately 2:40 p.m. and 2:55 p.m. on the date in question Collins was in the company of an unidentified informer at that location. Agents Fialewicz and Warden testified that they were on duty and had the particular scene under surveillance (Tr. 99-101; Tr. 129-130). Agent Collins testified that sometime between 2:45 and 2:55 p.m. he made a purchase of a white powder which later proved to be heroin hydrochloride. This purchase was alleged

to have been made from the Appellant in this case. That testimony was, in effect, corroborated by Agents Fialewicz and Warden.

Each of the agents was closely cross-examined in regard to the question of the time of the transaction. (Tr. 70-89; Tr. 106-121; Tr. 131-138). There was no substantial variance in the testimony of any witnesses and in effect each corroborated the testimony of the other. Additionally, Appellant's trial counsel introduced documentary evidence which further substantiated the agents' testimony in regard to the time of the transaction.

Defendant's Exhibit No. 1 is a copy of the "Memorandum Report - Bureau of Narcotics, District No. 5," signed by Agent Charles T. Collins. This report, dated 10 March 1967, was shown to Agent Collins and he testified that the information contained therein was an accurate statement of the events which had transpired. (Tr. 86). Collins further testified that he prepared the report on the same day of the event in question. (Tr. 87).

In a like manner Defendant's Exhibit No. 2 is the same type of report but in this instance filed by Agent Gary G. Warden. Agent Warden also testified that he had prepared the subject report and that it was accurate at the time he signed it. He further testified that he had had a chance to read it prior to affixing his signature. (Tr. 133).

Defendant's Exhibit No. 1 shows the transaction to have occurred at 2:45 p.m. on the 10th of March 1967. Agent Warden's report (Defendant's Exhibit

No. 2) shows the transaction to have occurred between 2:40 and 2:55 p.m. on the day in question.

Appellant's defense was entirely that of alibi. Not only did the Appellant take the stand himself to testify as to his whereabouts during the period of time that the transaction is alleged to have occurred (Tr. 159-167), but also called a corroborating witness whose testimony in no way varied from that of the Appellant's. (Tr. 218-224).

The most important aspect of Appellant's testimony was to the effect that between 2:00 p.m. and 2:55 p.m. on the 10th of March he was at the Sure-Fit Seat Cover Center at 14th & Q Streets, N.W. in the District of Columbia. And that at the time in question Appellant was the victim of a gunshot attack by an unknown assailant. (Tr. 155-156). The Appellant was examined closely both on direct and cross-examination in regard to his activities from early the previous evening up to the time he received the gunshot wound. (Tr. 155-158). There was no contradiction in his testimony.

Trial counsel introduced into evidence (Defense Exhibit No. 3) a copy of the "Metropolitan Police Department Offense Report" (PD 251) showing that on the 10th of March 1967 Robert L. Stuckey was shot, "in the upper left leg with a pistol" The report shows that the time of the occurrence was 2:45 p.m. on the day in question and took place at 1601 14th Street, N.W. (established to be the Sure-Fit Seat Cover

Center). The report goes on (Para. 2) and shows that Detectives Jenkins and McEwen responded to that location where they arrested one Rudy Mercer. The report goes on to state that the complainant (shown as Robert L. Stuckey) was transported to Freedman's Hospital by the District of Columbia Fire Department Ambulance No. 1 and was treated at that facility. No objection was raised to the introduction into evidence of this report and, in fact, it was stipulated to by the government. (Tr. 213-214).

In addition, trial counsel introduced into evidence as, Defendant's Exhibit No. 4, a copy of "Patient's History and Summary Sheet (Emergency Department) Freedman's Hospital, Washington, D. C." This particular report, No. 261172. Again the government did not object to and, in fact, stipulated to the introduction of this evidence. Defendant's Exhibit No. 4 shows Robert L. Stuckey as the patient and shows his admission to the emergency department at 3:10 p.m. on the 10th day of March 1967.

The period between 2:55 p.m. and 3:10 p.m. was accounted for by the testimony of Mr. Daniel J. Place (Tr. 206). Mr. Place is a Fire Chief in the District of Columbia in charge of emergency ambulance service. In that position he has custody and control of the official documents of the Fire Department covering the dispatch of ambulances in the District of Columbia. (Tr. 206). Mr. Place, of course, was also called by the defense in order to account for the transportation of Mr. Stuckey from the Sure-Fit Seat Cover Center to Freedman's Hospital. Once again

the government stipulated as to the authenticity of the journals reflecting the dispatch of ambulances and the entries therein. In fact the Assistant United States Attorney suggested that they be read to the jury with, "perhaps an explanation from Chief Place as to what they mean." (Tr. 206-207).

Chief Place testified that on March 10, 1967, at 2:55 p.m., a request was received via telephone for an ambulance to respond to 14th and Q Streets, N.W. in the District of Columbia. That ambulance, one (1), was dispatched and picked up one Robert L. Stuckey - the injured person. The journal further reflected that at 3:11 p.m. the, "ambulance reported ready for service at Freedman's Hospital." (Tr. 207). Chief Place explained that reporting ready for service means that Mr. Stuckey had been delivered to the hospital and that the ambulance was now ready for additional responses. (Tr. 207-208). He further testified that no changes had been made in the dispatch records since the time of their entry. (Tr. 208).

Thus, although the government attacked the testimony of Mr. Stuckey and his corroborating alibi witness, Mr. Cunningham, it did not attack three significant pieces of documentary evidence in the nature of official reports of police investigating agencies. The documentary report of a hospital was agreed to and the government further stipulated to the reading of journal entries of a government agency of the District of Columbia into evidence. In fact, the government stipulated to the

contents of all of these documents. Can there be any question that if the jury did not ignore these documents and evidence that any reasonable man would have had a reasonable doubt as to the guilt of Mr. Stuckey?

This Court has long recognized that it must reverse a conviction in a criminal case where it is clear that upon the evidence a reasonable mind must necessarily have a reasonable doubt as to guilt. (E.g., Cooper v. United States, 94 U.S. App. D.C. 343, 345, 218 F.2d 39, 41 (1954); Hopkins v. United States, 107 U.S. App. D.C. 126, 275 F.2d 155 (1959); Douglas v. United States, 99 U.S. App. D.C. 232, 239 F.2d 52 (1956); Farrar v. United States, 107 U.S. App. D.C. 204, 275 F.2d 868 (1960) and Hemphill v. United States, 131 U.S. App. D.C. 46, 402 F.2d 187 (1960)). The question, of course, is always one of determining when that reasonable mind will hold a reasonable doubt.

In cases where the evidence of both sides is controverted and contradicted by the other, the Court will generally have a very difficult time in making that determination. Indeed where there is conflicting testimony the Appellate courts will usually adhere to the general rule established in Glasser v. United States, 315 U.S. 60; rehearing denied 315 U.S. 287 (1942). In Glasser, at page 80, the Supreme Court said:

It is not for us to weigh the evidence or to determine the credibility of witnesses. The verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the government to support it. (Citing United States v. Manton, 107 F.2d 834, 839 (2d Cir. 1938)).

Thus, where there is conflicting testimony, the decision is usually made by the jury based upon its observation of the demeanor of the witnesses and its evaluation of the credibility of those persons appearing in the Court. Consequently, of course, the Courts of Appeal are very reluctant to invade the province of juries established in Article Three of the Constitution and supported by the Sixth Amendment thereof.

However, that is not the case in the instant appeal. The evidence outlined supra was not only uncontroverted but stipulated to by the government. In these instances it is a much simpler task for an Appellate Court to determine when the jury did not properly discharge its functions. In Douglas v. United States, 99 U.S. App. D.C. 232 (1956) at page 239, this Court said that, "A jury may not be upheld in arbitrarily convicting of a crime" This is a reflection of the well established principle that any conviction of a crime must be beyond a reasonable doubt held by a reasonable man. (Brinegar v. United States, 338 U.S. 160, rehearing denied 338 U.S. 839 (1949); see also Crawford v. United States, 126 U.S. App. D.C. 156, 357 F.2d 332 (1967) and Brooker v. United States, 128 U.S. App. D.C. 19, 385 F.2d 279 (1964)). Patently, where uncontroverted testimony establishes a fact which contests an essential element of the government's case that reasonable doubt perforce must exist in the minds of reasonable jurors. This is true by definition.

Even if it is conceded, in arguendo, that there was some conflict of the testimony in this case; i.e., because of the government's attack on the testimony of Mr. Stuckey and Mr. Cunningham, the result is the same. In Hopkins v. United States, 107 U.S. App. D.C. 126, 275 F.2d 155 (1959), citing a long line of cases, this Court held that a verdict in a criminal case must be reversed where it is clear upon the evidence that a reasonable mind must necessarily have a reasonable doubt as to guilt. (See also: Cooper v. United States, 94 U.S. App. D.C. 343, 345, 218 F.2d 39, 41 (1954)). In Hopkins the appellant was convicted of attempted abortion. On appeal the issue centered around the finding that the defendant was not free of mental disease or defect at the time of the alleged crime; i.e., that the jury rejected the defense of not guilty by reason of insanity. In the trial of that case there was conflicting testimony as to the mental capacity of the appellant. Two laymen testified that the appellant showed no signs of insanity during brief opportunities to observe her. On the other hand, three psychiatrists testified as to the appellant's being schizophrenic. This Court felt that, despite the acknowledged competency of laymen to testify as to mental condition, "a reasonable mind must necessarily have a reasonable doubt as to guilt." (At p. 345). That is, that given the existent testimony of three experts, their opinions, if not ignored, must raise a doubt in a reasonable mind. So it is in the instant case. A reasonable mind cannot ignore the evidence stipulated to by the government; once it is recognized that doubt must lie because the evidence and testimony has not been impeached.

Another way of looking at the problem is to recognize that the jury may be well within its province to ignore or to give little weight to the testimony of interested parties. However, where there is testimony of an uninterested party, and perforce the testimony of the government through its documents and records as in this case is more than uninterested party and is indeed the adversary, then the jury may not, in the proper exercise and discharge of its functions, ignore that testimony. (See Stone v. Stone, 78 U.S. App. D.C. 5, 136 F.2d 761 (1956)). The conflict thus being unresolved the doubt fills the void left by lack of decision.

Since cases involving the defense of not guilty by reason of insanity involve the determination of the question of criminal responsibility, which is an issue of fact, the reasoning in those cases can be applied to this appeal. In Douglas v. United States, 99 U.S. App. D.C. 232, 239 F.2d 52 (1956) the defendant in the court below claimed the defense. There was evidence to the effect that defendant was of unsound mind at the time of the two robberies involved. (There were two separate trials - appeals were consolidated.) He, in fact, was committed to St. Elizabeth's Hospital and then released to stand trial (nearly two years later) upon the determination of his competency to do so. Two psychiatrists who had interviewed and treated the defendant extensively while he was at St. Elizabeth's testified as to his unsound mind at the time of the robberies. (P. 235). In addition, the defendant's sister testified as to certain suicide attempts on

his part. On its part the government depended upon statements of the victims of the robbery to establish the defendant's sanity. It also depended upon the statements of the arresting officers. Thus, there was conflicting evidence and testimony in regard to the critical question of fact i.e., condition of the defendant's mind.

At page 237 this Court stated that, "in an appropriate case there is a duty to set aside a verdict of guilty" Certainly a jury may not be upheld in a situation where it arbitrarily convicts of a crime; i.e., it ignores the weight of evidence which would raise that reasonable doubt. This Court went on to explain its meaning as follows:

In the present cases we are simply unable to say that the juries were warranted on the evidence in failing to entertain a reasonable doubt that except for a diseased mental condition Douglas would have committed the robberies, that is, we are unable to say that the juries were warranted in reaching an abiding conviction that the abnormal mental condition . . . was not a cause without which the . . . robberies would not have occurred. Being of this opinion, after according due deference to the verdicts of the juries . . . we are constrained to conclude that it would be inconsistent . . . [to affirm the verdicts of guilty].

Or as this Court said in Farrar v. United States, 107 U.S. App. D.C. 204, 275 F.2d 863 (1960), "we must reverse a criminal conviction when it is clear to us that upon the evidence . . . a reasonable mind must necessarily have had a reasonable doubt as to . . . guilt."

(Citing: Hopkins v. United States, supra).

Concededly the most difficult hurdle that an Appellant must overcome in asking an Appeals Court to overturn the verdict of a jury is the natural reluctance to invade that sanctity. However, in Footnote 5 on page 206 of Farrar this Court quite aptly points out that, "decisions sustaining particular verdicts are sometimes accompanied by dicta that all verdicts must be sustained. Decisions rejecting particular verdicts prove the contrary. So does the practice of directing verdicts."

It is respectfully submitted that where, as here, testimony from disinterested sources establishes a fact which is uncontroverted; and which fact clearly controverts an essential element of the government's case a reasonable doubt must be raised in the minds of reasonable jurors. In light of this doubt the jury could not have properly discharged its functions and the verdict must not be allowed to stand.

II

The District Court Committed Error Under Rule 52(b)
of Federal Rules of Criminal Procedure When It
Made an Unconstitutional Comment Upon the Accused's
Silence by Instructing the Jury in Accordance With
the Statutory Presumption Contained in 21 U.S.C.
§174 and the Statutory Inference Contained in
26 U.S.C. §4704(a).

After presentation of the evidence in the trial below the Court instructed the jury, according to the standard jury instructions, in regard to the various aspects of the law involved in the trial. When the Court dealt with the statutory provisions in regard to finding the crimes involved under sections 174 of 21 U.S.C. and 4704(a) of 26 U.S.C. the Court quite correctly set out the elements of the crimes and quite properly added that the government must prove each and every element of the crime. However, following that the Court went on to instruct the jury that despite what it had just said, and despite the fact that the government introduced absolutely no evidence as to the origin of the heroin involved, that in regard to §174 the jury was allowed to presume that the defendant knew that the heroin was illegally imported into the United States. It is respectfully submitted that this constitutes plain error.

While it has traditionally been held that the statutory presumption does not have the effect of placing the burden of proof upon the appellant [See: Ye Hem v. United States, 268 U.S. 178, 179 (1925)], there are nevertheless substantial constitutional infirmities involved in the use of such presumptions to which the Court's attention is respectfully directed.

This statutory presumption, when included in the Court's instruction to the jury, is no more than, and no less than an unconstitutional comment on the accused's silence. This is especially true when the defendant elects to avail himself of the privilege not to be a witness against himself. (See: United States v. Gainey, 380 U.S. 63 (1965); especially dissents of Douglas J. and Black, J.). Although defendant in this case in fact took the stand, the reasoning in Gainey still holds because the defendant's case in this instance was based entirely upon alibi and no attack was made upon the alleged illegal transaction in narcotics and no attempt, of course, was made to explain possession.

Since the decision in Ye Hem there has been a steady attack upon the statutorily authorized presumptions which allow the government to either forgo proving its case beyond a reasonable doubt or alternatively which would compel the defendant to waive his right against self-incrimination as guaranteed by the Fifth Amendment. Indeed, as paradoxical as it might seem, the recent decision in Turner v. United States, 396 U.S. 398 (1970) is but the last in a long and consistent, though somewhat timorous attack on statutory presumptions.

The Supreme Court, in Griffin v. California, 380 U.S. 609 (1965), (1965), pointed out that traditionally the no comment rule in federal courts had been based upon an Act of Congress. (18 U.S.C. §3481). The Court then went on, at p. 615 to base the rule upon the Fifth Amendment saying:

We said in Malloy v. Hogan . . . 'the same standards must determine whether an accused's silence in either a federal or state proceeding is justified.' We take that in its literal sense and hold that the Fifth Amendment, in its direct application to the federal government, and in its bearing on the states by reason of the 14th Amendment, forbids either comment by the prosecutor on the accused's silence or instruction by the court that such silence is evidence of guilt. (Emphasis supplied.)

It is submitted that there is no difference so far as the Constitution of the United States is concerned between telling the jury that the defendant's silence is evidence of guilt or telling them that they may infer guilt based upon some arbitrarily determined fact. That is, that the defendant is guilty of the offense charged unless the arbitrary fact is explained to the satisfaction of the jury. Clearly this runs against the fundamental concept of the presumption of innocence on the part of those charged until proven guilty. The most basic precept in the criminal proceeding being that the defendant need not put on any case whatsoever. How then may Congress determine that the defendant must put on a case in a particular instance. It is submitted that it cannot. It is further submitted that it is the duty of this Court as part of the Judicial Branch of the government to remind Congress that it may

not attempt such feats of legal and legislative prestidigitation.

While it is true that the trial counsel raised no objection to the specific presumption in 21 U.S.C. §174 and the inference contained in 26 U.S.C. §4704(a) at the time of the Court's instruction, such instructions, under the decisions, infra, constitute plain error under Rule 52(b) of the Federal Rules of Criminal Procedure and may be reviewed by this Court.

In Chapin v. California, 326 U.S. 18 (1967) the Court held that an accused's right not to have his silence commented upon by the Court was not harmless error. The Court said at p. 24:

. . . before a Federal constitutional error can be held harmless the Court must be able to declare a belief that it was harmless beyond a reasonable doubt.

Then the Court in applying that standard found no harmless error in the prosecutor's comments and the judge's instruction concerning the inferences which the jury could draw from the accused's silence. The Court's instructions, which under the facts in Chapin, supra were found to be unconstitutionally defective, are similar to the instructions normally given by Courts in cases involving the two statutes with which we are here concerned. The instruction in Chapin, in part, was as follows:

. . . As to any evidence or facts against him which the defendant can reasonably be expected to deny or explain because of facts within his

knowledge, that he does not testify to or if, though he does testify he fails to deny or explain such evidence the jury may take that failure into consideration as tending to indicate the truth of such evidence and indicating that among the inferences that may be reasonably drawn therefrom those unfavorable to the defendant are the most probable (at p. 19).

How similar this is to an instruction which says that given possession the defendant must explain it and if he does not explain it he is presumed to have knowledge of the illegality of the narcotic in his possession; and that this is to be construed against him too. Under the rule in Chapin it is submitted that the instruction given by the trial court here was violative of the defendant's constitutional rights and may be considered plain error.

A

The Decisions of the Supreme Court in Leary v. United States, Marchetti v. United States, Grosso v. United States and Covington v. United States Bring into Serious Question the Legality of Appellant's Convictions.

There is another, and somewhat more intriguing, aspect of these statutory presumptions which raises a series of constitutional questions. According to the statutes involved the only way a defendant can avoid

the effect of the presumption of §174 is to explain his possession to the satisfaction of the jury. However, to make such an explanation the defendant in effect would either have to admit to his possession of the narcotics, as in this case; or in instances where the actual possession was proven beyond a reasonable doubt, to admit to another crime or series of crimes. Such a series of alternatives is clearly violative of the Fifth Amendment.

The Federal regulatory scheme of narcotics control is based upon the power to tax and to regulate imports and trade. Thus, Congress taxes narcotics and punishes their illegal importation, sale, distribution or dispensing. Congress, however, has not chosen, and perhaps could not choose according to the holding in Wigro v. United States (276 U.S. 332, 341 (1928)), to make mere possession without more a crime. The states and the District of Columbia however, having the power to protect public health, safety and morals may, and have, made the mere possession of narcotics a crime. (See D.C. Code 1967, §§33-401 et seq.). Thus, if the accused admits possession in order to offer an explanation for that possession as the first step in attempting to extricate himself from his entanglement with the Federal statutory scheme he is immediately ensnared in the local or state law.

The rule in Murphy v. The Waterfront Commission, 378 U.S. 52, 54 (1969) established that it is proper for a person in a federal proceeding to

invoke the Fifth Amendment when to testify would be to incriminate himself under state law. Here the accused will expose himself to possible conviction under the Narcotics law cited supra in effect in the District of Columbia if he were to attempt to explain his possession. This, of course, is presuming that the defendant would even seek to explain his possession. The predicament is put into even sharper focus when as in this case an attempt to explain possession is precluded by the defendant's case in fact, i.e., alibi. If the Fifth Amendment precludes a conviction for failure to comply with a statute which requires self-incrimination (See: Marchetti v. United States, 390 U.S. 29 (1968)), then logically, it should also preclude the application of a statutory presumption which, if sought to be overcome by an accused's testimony, would only lead to incrimination under another statute.

In regard to §4704(a), in addition to certain other aspects of the Federal Regulatory scheme which will be discussed infra in regard to §174, there is the additional onerous provision that no one except the registrant can obtain an order form, as required in §4704, as provided for in 26 U.S.C. §4705(g). This additional requirement under §4705 casts an even darker shadow of doubt upon the constitutionality of §4704 and is a doubt that the government has apparently had since 1937. In hearings before the House Committee on Ways and Means for the 75th Congress, (1st Sess.) the then Assistant General Counsel for the

Treasury Department, Clinton M. Hester, stated that the proposed regulation of marijuana was a, "synthesis of the Harrison Narcotics Act (now 26 U.S.C. §4701 et seq.) and the National Firearms Act (now 26 U.S.C. §5841 et seq.). Then referring to the portion of the Harrison Narcotics Act which is now 26 U.S.C. §4705(g), requiring registration in order to be eligible to obtain order forms, Mr. Hester voiced doubts as to the constitutionality of the Act and went on to explain that the bill in question (H.R. 6385, 75th Cong., 1st Sess., (1937)), followed the Harrison Narcotics Act up to that point. He then testified that because of these constitutional doubts, like the National Firearms Act, the proposed legislation would permit the transfer of marijuana to non-registered persons upon the payment of a heavy transfer tax. (Hearings on H.R. 6385 Before the House Committee on Ways and Means, 75th Cong., 1st Sess., 9(1937)). This was the basis for the same doubts on the part of the Supreme Court. See: United States v. Nigro, supra.

Together these cases raise serious questions concerning the viability of the statutory scheme of narcotics taxation, and prosecutions thereunder when an accused invokes the defense of the privilege against self-incrimination. The Court's decision in Leary, / ^{395 U.S. 6 (1969)} is only the logical culmination of an entire series of cases dealing with similar statutes.

In Marchetti v. United States, supra, the Court held that those who properly assert the privilege against self-incrimination have a complete defense and may not be criminally punished for failure to comply with the statutory requirements to register and pay the occupational gambling tax on wagering established under 26 U.S.C. §§4411 and 4412.

The aspect of the self-incrimination privilege which was invoked in Marchetti, and which was invoked in Leary, was not the undoubted right of an accused to remain silent at trial. It is, and was, the right not to be criminally liable for one's previous failure to obey a statute which required an incriminatory act. Using that language, the Court held in Leary v. United States, supra, that the statute^{26 U.S.C. §4744} was unconstitutional. That section is practically identical in operation and in intent to 26 U.S.C. §4704(a) under which the Appellant here was charged and found guilty. Section 4744 deals with unlawful possession of marijuana. Such unlawful possession being presumed upon the failure of any person having it in his possession, or having had in his possession, any marijuana, "after reasonable notice and demand", to produce the order form required by 26 U.S.C. §4742 to be retained by him. In addition, of course, because more than mere possession is required by the federal laws, the presumption applies to the person's liability for the tax imposed by 26 U.S.C. §4741. In a like manner §4704 of the Internal Revenue Code contains a similar presumption for illegal possession; such illegality being defined by the absence of an original stamped package or the absence of any appropriate tax paid stamps.

In Grosso v. United States, supra, the Court applied the reasoning of Marchetti to the excise tax on wagers established under 26 U.S.C. §4401. In so doing the Court held that the petitioner in that case could not be convicted for failing to pay a tax on wagers received when he invoked the privilege against self-incrimination. In a companion case, Haynes v. United States, 390 U.S. 85 (1968), the Court went even further and held that a proper claim of the privilege provided a full defense against prosecution either for failure to register firearms under 26 U.S.C. §5841, or for possession of an unregistered firearm under 26 U.S.C. §5851. This, of course, is the National Firearms Act to which Mr. Hester referred in his testimony before the Senate and the House in 1937 (supra).

The gist of the Court's reasoning in these cases has been that a man cannot be punished for a crime when the only way he could comply with the requirements of the law would be to incriminate himself with regard to some other crime. In Marchetti the petitioner was charged with the failure to pay an occupational tax imposed upon gamblers, and also with the failure to register as a gambler. The Court pointed out that the two requirements are inseparable, as the Treasury Department would not accept the tax payments without the registration form, as in the instant case. The Court then went on to show that there was a "real and appreciable" hazard that a registrant would be subjected to prosecution under state laws for gambling if he should register under the federal law. In fact his name and information were by statute

(26 U.S.C. §6107) made available to the state prosecutors. Precisely the same situation prevails under 26 U.S.C. §4705(d) in regard to narcotic drugs and under 26 U.S.C. §4742 in regard to marijuana and under 26 U.S.C. §4732 in regard to opium. Furthermore, all of these situations are provided for generally in the catchall §4773 of the Internal Revenue Code. In Marchetti the Supreme Court found that the report requirements imposed upon gamblers had the direct and unmistakable consequence of incriminating the defendant. Certainly, the same is true here where the effect is even more pervasive.

III .

Despite the Recent Ruling in Turner v. United States
This Court Should Apply the Well Recognized Tests To
Determine Constitutionality and Declare Appellant's Conviction
Under 21 U.S.C. §174 To Be Unconstitutional.

Upon first examination it may appear that the decision in Turner v. United States, 396 U.S. 398 (1970), precludes further consideration of an attack upon the constitutionality of 21 U.S.C. §174; at least so far as that attack is upon the statutory presumption of knowledge of illegal entry of heroin into this country once the defendant is shown to have had possession of any heroin. This would be true if the Supreme Court had had the power to approve such a statutory presumption. In fact it does not and its approval of such a presumption amounts to a mere nullity.

Neither the Supreme Court, nor the Congress of the United States, has the right to amend the Constitution so as to relieve the government of its traditional burden in a criminal proceeding; to cause a defendant to be presumed to be guilty; and to cause a defendant to testify against himself and to mount a defense even absent a prima facie showing against him. Furthermore, the government may not be allowed that the prima facie showing of guilt by mere statutory enactment.

As Mr. Justice Black said in his dissent in Turner:

Congress can undoubtedly create crimes and define

their elements, but it cannot under our Constitution even partially remove from the prosecution the burden of proving each of the elements it has defined. The fundamental right of the defendant to be presumed innocent is swept away precisely to the extent judges and juries rely upon statutory presumptions of guilt found in 21 U.S.C. §174.

Turner involved a prosecution of four counts; one each for heroin and cocaine, the possession and sale thereof, and therefore for violation of 21 U.S.C. §174 and 26 U.S.C. §4704(a). The Court reversed on two counts in regard to the cocaine because it deemed the presumption under §174 to be invalid as it would not be supported on the actual facts i.e., domestic cocaine is to be found in the United States. In regard to the count on cocaine under §4704 the Court found that the conviction was not supported by substantial evidence. However, the Court allowed to stand the convictions on both counts under both sections that, is §174 and §4704, in regard to the possession of heroin. The government did not present any evidence as to the origin of the narcotic drugs involved.

In reaching these conclusions the Court applied a test established in Leary v. United States, 395 U.S. 6 (1969) which has come to be known as "more likely than not" test. At page 405, the Court sets out the rule which it deems to have established i.e., that certain cases (Tot v. United States, 310 U.S. 463 (1943); United States v. Gainey, 380 U.S. 63 (1965) and United States v. Romano, 382 U.S. 136 (1965)) require "the invalidation of the statutorily authorized inferences unless it

can be at least said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact upon which it is made to depend. (Citing: Leary v. United States, 335 U.S. at 36).

The Court then goes on and attempts to apply this rule to §174 and §4704. First, the Court agrees that in order for the conviction to be sustained it is necessary to prove the three elements involved in §174. That is, (1) knowingly receiving, concealing and transporting heroin; which (2) was illegally imported and (3) that the defendant knew the heroin was illegally imported. At page 405 the Court says, "for conviction it was necessary for the government to prove each of these three elements of the crime to the satisfaction of the jury beyond a reasonable doubt" The Court then quite aptly summarized the government's case as follows:

The proof was that Turner had knowingly purchased heroin; since it is illegal to import heroin from manufacturers here he was also charged with knowing that his heroin had an illegal source. This was the government's case.. (At p. 405).

In referring to the instructions given the jury the Court said that the jury was instructed that it was the sole judge of the facts and inferences to be drawn and that all elements of the crime had to be proven beyond a reasonable doubt. (At p. 406). However, in the next sentence the Court makes a mockery of this entire line of reasoning by admitting that the jury could draw its conclusions of guilt from the statutorily approved inferences. (At p. 407). That is, that the Court recognizes that the assumption of common knowledge of foreign

sources of opium and heroin so crucial to its "more likely than not" test may not be so "common" after all. In fact, no case has been cited, either by the government in its brief to the Supreme Court, or by the Court itself in its decision in Turner in which the jury was left free to decide upon the defendant's knowledge of illegal importation untainted of being informed of the statutory presumption allowed, or which the Court deems to be allowable. The presumption upon which the Court bases its entire decision has never been tested, i.e., that everyone knows that heroin comes from without the United States.

In all cases cited in Footnote 6 on p. 406 of the Court's decision, the presumption was stated in the instructions to the jury. Therefore, the Court's exercise of assuming different postures of the juries' collective minds in all these cases is a sham. It does not require any powers of extra sensory perception to determine what was in fact in those jurors minds. Through the instructions, they had been told by their government that no heroin is present in the United States by legal means. This is true even though the government may not have placed into evidence any demonstrated proof of this assumed fact. Instead, they are instructed by the Court in all its majesty that any possession is illegal possession because no heroin can be in the United States except by illegal means and this is amply enforced by the presumption's form as dictated by the statute. If the basis for this presumption were in fact true, i.e., that every person knows that there is no heroin produced in the United States and therefore all heroin

must come from illegal foreign sources, the instruction, indeed, the presumption contained in the statute would not be necessary.

The Court well recognized this and indeed focuses on this point. Understanding that the jury may well have relied upon the inferences authorized by the statute the Court goes on to say, "our focus is on the validity of the evidentiary rule contained in §174." (P. 407).

What the Court does next is nothing less than a judicial about face. In order to preserve the logical progression of its decision in the text, the Court relegates to a footnote (Footnote 8 running between pages 407 to 409) the most substantial argument against its decision. This footnote cites a long line of cases in which the court has found that similar presumptions contained in statutes have been defective because they unconstitutionally relieve the government of the burden of proving guilt beyond a reasonable doubt. Citing: Leary v. United States, 395 U.S. 6 (1965); Gainey v. United States, 390 U.S. 63 (1965); United States v. Romano, 383 U.S. 136 (1958); Harris v. United States, 359 U.S. 19 (1959); Roviaro v. United States, 353 U.S. 53 (1957) and Tot v. United States, 319 U.S. 463 (1943). The court then went on to point out that it has also rejected the suggestion that since the source of drugs is more within the defendant's knowledge it violates no rights of the defendant to convict based upon possession alone if he refuses to demonstrate legal sources for the drugs. The Court points out the pitfalls of such a suggestion. That is, that the

government is thereby clearly relieved of its obligation to prove its case unaided by the defendant and the defendant is convicted on less than sufficient evidence to constitute a prima facie case. (Citing Tot, supra).

Despite all of this the Court said, "we have no reasonable doubt that at the present time heroin is not produced in this country and that therefore the heroin Turner had was smuggled heroin." (P. 408).

Therefore possession of heroin is equivalent to possession of imported heroin. Seemingly the Court is inviting someone to disprove this assumption. In fact, the ludicrousness of the assumption is demonstrated merely by a simple hypothetical situation. If counsel, with appropriate guarantees of immunity, were to appear in court with a growing opium poppy, the entire basis for the Supreme Court's decision would be destroyed. This is especially true in this case where the appellant was charged for the possession of a very small quantity of heroin. Certainly not so-called "commercial amounts."

However the Court goes through a long exercise - stating that in the sixty years that the Narcotic laws have been in existence no one has come forward to demonstrate that heroin is produced in the United States. The proof being, "Although there was opportunity in every case to challenge or rebut the inference based on possession we are cited no case, and we know of none, where substantial evidence showing domestic production of heroin has come to light . . . it is difficult

to believe that resourceful lawyers with adversary proceedings at their disposal would not have long since discovered the truth and placed it on the record." (At pages 409-410; emphasis added). Not only does this ignore the Court's immediately preceding pronouncement that the defendant need not prove the government's case; that is, it is up to the government to demonstrate that the heroin entered the country illegally and that the defendant had knowledge of this illegal importation. Neither in *Turner*, nor in Appellant's trial did the government offer such evidence.

What would the Court do - have attorneys allege knowledge of domestic production? Undoubtedly the Court would ignore such allegations as summarily as it rejected the statements of acknowledged experts in the field to the same effect; i.e., D. Maurey and V. Vogel (See: Narcotics Narcotic Addiction (3rd ed., 1967)). The Court dismissed the statement that there is and was domestic production of heroin by saying, "if it (the statement as to domestic production) ever were true, it is no longer accurate." (P. 415; Footnote 27).

Alternatively it seems that the Court is inviting attorneys to demonstrate other sources of heroin production in the United States. But again in the face of a pervasive legislative scheme designed to cut off those sources, this suggestion is merely a palliative to the Court's conscience. To attempt demonstration by the defendant would merely put that

defendant in jeopardy of other statutes, not merely the one for which he was on trial.¹ Thus, the Court's invitation to show domestic production is condemned out of its own mouth.

The fallacy of the Court's position is even more graphically demonstrated in a situation such as in the trial below. There Mr. Stuckey did not offer any evidence as to possession for the very logical reason that his entire case was one of alibi. The Appellant said that he never did have possession because he was in fact was not the person who participated in the alleged transaction. How the Court could have ignored such an obvious situation in cases covering sixty years of experience is surprising to say the least.

¹For example, violation of: The Opium Poppy Control Act of 1942 (56 Stat. 1045, 21 U.S.C. §§183-188n); or The Narcotics Manufacturing Act of 1960 (74 Stat. 55, 21 U.S.C. §§501-517) prohibiting the manufacturing of narcotic drugs except under license issued by the Secretary of the Treasury for production of approved drugs. Since heroin is not considered useful for medical purposes production is not authorized; heroin used in scientific experimentation is supplied entirely from quantities seized by law enforcement officials (Footnote 13, Turner v. United States, *supra*). 21 U.S.C. §173 makes it unlawful to import any narcotic drug except amounts of approved opium and copra leaves necessary to provide for medical and scientific uses. In addition, for more than forty-five years it has been unlawful to import opium for the purpose of manufacturing heroin. (Act of June 7, 1924, 43 Stat. 657 (Narcotic 5, 21 U.S.C. §173)). Through 21 U.S.C. §513 the Secretary of the Treasury permits and authorizes the importation of any narcotic drug for delivery to a governmental official or any person licensed to use the drugs for scientific purposes. The Secretary has never authorized the importation of any heroin under this provision (Footnote 12 on p. 411, Turner v. United States.)

Thus, ignoring all of the obvious objections and announcing itself satisfied that, "the inference of knowledge from the fact of possession of heroin is a sound one." (At p. 417). And, "hence the [trial] Court's instructions on inference did not violate the right of Turner to be convicted only on a finding of guilt beyond a reasonable doubt and did not place impermissible pressure upon him to testify in his own defense" (at pp. 417-418), affirmed the action of the trial Court. This is pure ipse dixit.

As Mr. Justice Black points out on his dissent to Turner, and I can do no more than defer to him:

I do not think a reviewing court should permit to stand a conviction as wholly lacking in evidentiary support as is Turner's (Thompson v. Louisville, 382 U.S. 199 (1966)). It is well established that when the evidence for conviction is insufficient as a matter of law, to reverse the conviction is in accord with . . . historical principle . . . appellate judge's have a most important place under the constitutional plan since they have power to set aside convictions. United States Ex Rel. Troth v. Quarles, 350 U.S. 11, 19 (1955).

At page 432, Justice Black goes on to point out that due process of law requires that the accused have his case tried by a judge and jury in a court of law without legislative constraint or interference. He further points out these statutory presumptions clearly violate the command of the Sixth Amendment of the Constitution.

Undoubtedly, any such statutory inference robs the defendant of at least a portion of his presumed innocence. Under our judicial system the burden is squarely upon the government to show guilt. It makes no difference whether the statute explicitly says the defendant can rebut the presumption of guilt (as in 21 U.S.C. §174); or whether the statute simply uses the term "prima facie case", and leaves implicit possibility of the defendant's rebuttal (as in 26 U.S.C. §4704).

Presumptions of both forms must perforce coerce and compel defendants to take the witness stand in his own behalf. This is a clear amelioration of the accused's Fifth Amendment privilege against self-incrimination. This privilege has consistently been interpreted as establishing the defendant's absolute right not to testify at trial unless he freely chooses to do so. Malloy v. Hogan, 373 U.S. 1, 8 (1964). See also: Turner, supra at 433 (Black, J. dissenting). The case is even more critical where, as here, the defense is one which precludes any testimony in order to rebut the statutory presumptions.

Clearly, therefore, when the defendant declines to testify; and the trial judge tells the jury that evidence of possession of narcotics shall be deemed sufficient to convict, "unless the defendant explains the possession to the satisfaction of the jury," such an instruction is nothing less than a judicial comment upon the defendant's failure to testify. This is a practice which has been long condemned. Griffin v. California, 380 U.S. 609 (1965).

Any act of Congress which attempts to relieve the government of its burden in a criminal matter is an attempt to alter the Constitution of the United States. Any attempt by the Congress to diminish the presumption of complete innocence of an accused prior to conviction by a jury of his peers is again an attempt to alter the Constitution of the United States. And any attempt by Congress to force a defendant to testify against his interests, to self-incrimination, or to implicate himself in the violation of any law is an infringement of the Fifth Amendment of the Constitution and is invalid. In a like manner any decision which upholds such actions by the Congress is perforce a nullity. It is therefore the duty of the Courts of Appeal to continue to decide cases brought before it in light of the traditional standards established under the Constitution and decisions consistent therewith.

IV

A Delay of More Than Two and One-Half Years
From the Date of the Alleged Transaction to
Trial Unduly Prejudiced Appellant's Case in
Violation of His Sixth Amendment Right to a
Speedy Trial.

The right to trial by jury as established in Article Three of the Constitution of the United States is substantially reinforced by the Sixth Amendment thereto. This is especially true in regard to the Amendment's requirement that the accused enjoy, "the right to a speedy and public trial." It is well recognized that the right of a speedy trial is necessarily a relative one. It is also recognized that this measure of relativity must be consistent with delays inherent in the proper administration of justice and dependent upon circumstances. (Beavers v. Haubert, 198 U.S. 77, 87 (1905)). However, balanced against this is another well settled principle that where the delay was either purposeful or excessive or not wholly accidental, the delay shall be deemed violative of the defendant's Sixth Amendment right. (Pollard v. United States, 352 U.S. 354 (1957)). The measure of oppression caused by delay can take many forms. In effect however the test remains a very pragmatic one and depends upon the cumulative effect upon the defendant. (See: United States v. Provo, 350 U.S. 857 (1955)).

In the instant case the delay was in two stages. The first was a delay in arresting the Appellant after the alleged transaction in illegal narcotics; the second was the delay in bringing him to trial.

This Court has recognized that delay in arresting a suspect in cases similar to the one at bar may seriously impinge upon the due process guarantees of the Fifth Amendment of the Constitution. These considerations are founded on the same reasons that a speedy trial is required by the Sixth Amendment. That is, unreasonable delay becomes oppressive and prejudicial because it creates difficulties for the accused in properly preparing and presenting a defense. When the defendant is denied that ability through the inaction, or the purposeful non-action, of the government, due process of the law has seriously been impeded and the purpose of the Sixth Amendment has become frustrated.

This reasoning was applied in overturning the conviction of the defendant in Ross v. United States, 121 U.S. App. D.C. 233, 349 F.2d 210 (1955). (See also: Hickens v. United States, 16 U.S. App. D.C. 300, 340, 323 F.2d 808, 810 (1963) and Wilson v. United States, 118 U.S. App. D.C. 319, 335 F.2d 982 (1964)). In Ross there was a delay of seven months between the time of the alleged occurrence and the arrest. The government sought to explain this delay by the fact that the arresting officer was an undercover agent. The Court recognized that in narcotics cases the undercover agents would work for a period of time incognito. Following their assignment they would "surface" when

filing or swearing out complaints or warrants for the arrest of the individuals whom they had had transactions in narcotics with. In Ross the Court found the delay of seven months to be purposeful (at p. 238); not logically allotted to the alleged purpose for the delay.

It is significant that while in Ross the police officer made no formal report until seven months after the transaction; in this case the special agents filed reports on the same day of the transaction. There was no explanation for the one month delay in swearing a warrant for the Appellant's arrest. Thus the only basis which this court considered as going toward explaining the delay in Ross; i.e., need to remain undercover, was entirely absent here. Such unexplained delay can only be characterized as purposeful. The reasoning in Ross was followed in Woody v. United States, 125 U.S. App. D.C. 192, 370 F.2d 214 (1966),¹ in which the conviction was reversed following a four month delay in the arrest of the defendant in that case. There the Court found that a delay of four months prejudicial when judged in the circumstances of the case.

Certainly, there is a recognizable interest in undercover narcotics investigations. However, as Chief Judge Bazelon in Woody made it clear,

¹Some other cases following Ross and Woody decided by this court: Hood v. United States, 125 U.S. App. D.C. 16, 365 F.2d 549 (1966); Horrisson v. United States, 124 U.S. App. D.C. 330, 365 F.2d 521 (1966); Abbey v. United States, 121 U.S. App. D.C. 337, 350 F.2d 467 (1965); Rivey v. United States, 123 U.S. App. D.C. 32, 356 F.2d 765 (1965); Jackson v. United States, 122 U.S. App. D.C. 124, 351 F.2d 8 (1965); Cannady v. United States, 122 U.S. App. D.C. 120, 351 F.2d 817 (1965) and Hackey v. United States, 122 U.S. App. D.C. 397, 351 F.2d 794 (1965).

that to strike a proper balance the Court in Ross looked at two factors. One, the prejudice to the defendant stemming from the method of investigation and two, the reasonableness of the police conduct. This inquiry of consequence must be framed primarily in terms of the ability of the accused to prepare and present an adequate defense at trial and avoid the, "ultimate prejudice . . . the risk of erroneous conviction attributable to the process which led to the verdict of guilty." Woody v. United States, (376 F.2d 217 at 219).

The potential unreliability of the verdict alluded to in Ross, Woody and in United States v. Curry, (284 F.Supp. 458, 467 (1968)) derives from the fact that with excessive delay any accused person would have a difficult time preparing an adequate defense. This is especially true in undercover narcotics cases and even more so if that defense is alibi. That is, the defendant would be convicted more on the fact of his inability to mount a defense than on the strength of the government's case. This is assuming of course, that the government could mount a prima facie case against the accused.

A

The Essential Prejudice of Delay Prevented
Appellant from Presenting an Adequate
Defense at Trial.

Certainly all the elements for prejudice are present in the instant case. If it were not for preservation of certain evidence in official government records occasioned ^{by} the unhappy, but ironically fortuitous, fact of the Appellant being assaulted and wounded by gunshot, the only witness that the Appellant could have called in his defense would have been Mr. Cunningham. Apparently Mr. Cunningham was not a very impressive witness - evidence the fact of Appellant's conviction. Mr. Cunningham was the only witness which defense counsel called out of a list of thirty-four (34) potential witnesses submitted to him by Appellant (Tr.5). Mr. Bou (trial counsel) sent each of those persons letters requesting that they contact him (Tr. 5). Out of this list only one witness could be found who could be of assistance at trial (Tr. 6). This is the very essence of the prejudice to accused when trial is excessively delayed.

Appellant's defense ^{at} trial was that of alibi. In the face of law enforcement officers, with experience or training in giving testimony, experienced trial counsel well know that it is important to bring as impressive a line of witnesses as possible, or as will be allowed by the Court, before the jury. This is the only means to prove the alibi

to any substantive extent (aside from official records); at least to any extent which would impress the jury.

The Court below heard Appellant's motion to dismiss for lack of a speedy trial. The Court rejected this motion. It is respectfully submitted that to do so was erroneous.

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The Inaction of the Government Further
Contributed to the Delay in Bringing
Appellant to Trial in a Manner Which
Can only be Characterized as "Purpose-
ful" and "Oppressive."

A brief chronology of events surrounding this matter/suffice to demon-^{will}strate the prejudicial delay involved here generated through the government's inaction or purposeful delay. Appellant was indicted on 17 July 1967 for the incident which was alleged to have occurred on 10 March 1967. On 12 July 1968 a bench warrant was ordered and issued for Mr. Stuckey's appearance. (Tr. 9). The government claims that it was not until this time that it learned that Mr. Stuckey was incarcerated in California. (Tr. 10). A petition for writ of habeas corpus ad prosequendum was not filed until October 7, 1968. This writ was directed to the Sheriff of Los Angeles County Jail.

Although in argument on the Motion for Dismissal, the government claimed that there was no showing of any intentional governmental conduct to deprive Mr. Stuckey of a speedy trial (Tr. 12); and that there was diligent effort on the part of the government to bring the Appellant back to the jurisdiction for trial (Tr. 17), the facts of the case do not substantiate these representations. The government by its own admission stated that there was a delay of five months between the time of filing of the first petition for writ of habeas corpus ad prosequendum and the time of the defendant's eventually being located in California. (Tr. 18). Despite this lapse the government attempted to show diligence by the fact that other petitions for the writ were issued. It is submitted that the issuance of the three such writs does not show diligence on the part of the government; if anything, the reverse is true. It is well known that the offices of the United States Attorney in the respective judicial districts have much more efficient means for locating defendants in federal criminal matters. At any time during the nine months or more from the issuance of the bench warrant in question to the time of the defendant being returned to the District of Columbia the office of the United States Attorney could have ascertained the Appellant's location in California with the ready assistance of any office of the United States Attorney in that state. In fact the location of the Appellant was (or could have been) well known because he filed a pro se motion for dismissal before the District Court below, from California. (Tr. 10-11).

Furthermore, there can be little doubt that the offices of the United States Attorney in that state would have cooperated to every degree possible to not only locate but to return the accused to the jurisdiction in which he would stand trial on a federal criminal charge. Had the obvious method of location been utilized, a single writ of habeas corpus ad prosequendum would have been necessary. Instead, the government choose the least reliable and most laborious method by which to effect the return of the Appellant. Under the circumstances, such delay necessarily led to Appellant's inability to prepare an adequate alibi defense. (See: Tr. 3-6). Furthermore, given the prima facie case provided for in the statutes under which Appellant was charged (21 U.S.C. §174 and 26 U.S.C. §4704(a); if this Court finds them valid, the Appellant's prejudice was compounded.

CONCLUSION

Based upon the foregoing, and in view of the serious intrusions upon the most fundamental Constitutional rights of Appellant, it is respectfully submitted that the Judgment of Conviction entered against the Appellant in the District Court for the District of Columbia Circuit in Criminal Case No. 873-67 must be set aside.

REQUEST FOR RELIEF

It is respectfully suggested that the appropriate remedy in this matter is to vacate the conviction of the Appellant herein and to enter a Judgment of Acquittal. In the alternative it is suggested that this Court remand the case to the District Court for new trial.

Respectfully Submitted,

Daniel Reiss, Jr.
Attorney for;
Robert L. Stuckey
Appellant
(By Appointment of This Court)



IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,907
(Crim. No. 873-67)

UNITED STATES OF AMERICA,
Appellee,

v.

ROBERT L. STUCKEY,
Appellant.

CERTIFICATE OF SERVICE

I hereby certify that a copy of Appellant's brief in the above-captioned matter has been delivered this 13th day of August, 1970, to the Office of the United States Attorney for the District of Columbia Circuit, United States Courthouse, Constitution Avenue and John Marshall Place, N.W., Washington, D. C.

DANIEL REISS, JR.